Calculating costs where a request spans different access regimes

Freedom of Information Act
Environmental Information Regulations

Contents

Overview....2
What FOIA says....2
What the EIR say....3
Multiple requests, but each individual request is for information falling under only one access regime....3
Single request, but the information requested spans FOIA and another access regime....4
  Step 1 - consider the request under FOIA....5
  Step 2 - consider any additional obligations under the EIR and the UK GDPR/DPA....5
  Environmental Information Regulations....5
  UK GDPR and Data Protection Act....7
Multiple requests, some of which are for mixed information....7
More information....8

The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities. The Environmental information Regulations (EIR) give rights of public access to environmental information held by public authorities.

Overviews of the main provisions of FOIA and the EIR can be found in The Guide to Freedom of Information and The Guide to the Environmental Information Regulations.

This is part of a series of guidance, which goes into more detail than the Guide to FOIA to help public authorities to fully understand their obligations, and to promote good practice.

This guidance explains how a public authority should calculate the costs of dealing with requests where the information requested spans different access regimes, for example, FOIA, the EIR and the subject access provisions of the UK General Data Protection Regulation (UK GDPR), which together with the Data Protection Act

2018 (DPA) establish the data protection regime. For an outline of the general rules about aggregating similar requests under FOIA, public authorities should first read our guidance on Requests where the cost of compliance exceeds the appropriate limit.

Overview

The costs of dealing with requests which clearly fall under different access regimes (FOIA, EIR and UK GDPR/DPA) cannot be aggregated.

Where any single request is for information which spans more than one access regime, then the costs of collating all the information can be taken into account under FOIA, but only the costs of collating the environmental information can be taken into account under the EIR.

What FOIA says

12. — (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-

(a) by one person, or
(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

What the EIR says

12. –(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) ….
(b) the request for information is manifestly unreasonable

Multiple requests, but each individual request is for information falling under only one access regime

Where a public authority receives multiple requests, but each individual request is for information falling under only one access regime (FOIA, EIR, or UK GDPR/DPA) then there can be no aggregation of costs across the different access regimes.

In this situation the public authority can only take the aggregated costs of responding to freedom of information requests into account under FOIA. Similarly it can only take the costs of responding to requests for environmental information into account when deciding if multiple similar requests are manifestly unreasonable under the EIR.

Example

A public authority receives the following requests in the same letter:

Request 1 – all "FOIA" information

Request 2 – all "EIR" information

Request 3 – all "EIR" information

Request 4 – all "FOIA" information

Request 5 – a subject access request

Outcome
The public authority can aggregate the costs of responding to requests 1 and 4 under FOIA (provided they meet the requirements for aggregation ie the requests are for the same or similar information).

The public authority can aggregate the costs of responding to requests 2 and 3 under the EIR when considering whether the requests are manifestly unreasonable under regulation 12(4)(b).

The public authority would need to deal with request 5 separately under the UK GDPR and the DPA.

This approach recognises the fact that the three different rights of access are independent of one another, having been established by separate pieces of legislation.

Single request, but the information requested spans FOIA and another access regime

However, a public authority may receive a single wide-ranging request for information; some of which it should consider for disclosure to the world under FOIA, some of which it should consider for disclosure to the world under the EIR, and some of which it should consider for disclosure to the applicant only under the subject access provisions of the UK GDPR/DPA.

For example, a requester may ask for 'all correspondence sent to the Council Chief Executive over the last 12 months'. The information which falls within the scope of this wide-ranging request may include environmental and non-environmental information as well as personal data. However, it would defeat the purpose behind section 12 and regulation 12(4)(b) if a public authority was obliged to collate the requested information in order to ascertain what information falls under which access regime(s).

Public authorities should therefore take the following approach:

Step 1 - consider the request under FOIA

A public authority can include in its estimate the costs of determining whether the information is held and locating, retrieving and extracting all of the information under section 12 FOIA, provided the requirements of the fees regulations are met.

This is the case even when some of the requested information may be environmental information or the requester's own personal data. This is because technically any request meeting the requirements of section 8 FOIA is a valid freedom of information request. This includes when some of the requested information is environmental information to which the exemption at section 39 of FOIA would apply, and when some of the requested information is the personal data of the applicant to which the exemption at section 40(1) would apply.

However, our guidance on Requests where the costs of compliance exceed the appropriate limit states that a public authority cannot include any costs relating to the application of an exemption. Therefore, whilst the public authority can include the estimated costs of identifying and collating all the information requested in the first place in the estimate, it cannot include the costs of separating out and redacting any environmental information or any of the applicant's own personal data under sections 39 and 40 FOIA respectively in the estimate.

Step 2 - consider any additional obligations under the EIR and the UK GDPR/DPA

Even though a public authority may be able to refuse a request under section 12 of FOIA, it still needs to consider its obligations under the EIR and the UK GDPR/DPA.

This is because even if the request is refused under FOIA the requester still has a separate right of access to environmental information under the EIR or to their own personal data under the UK GDPR/DPA.

Environmental Information Regulations

Under the EIR, it will only be permissible to take into account the costs related to the provision of environmental information as defined at regulation 2(1).

However, public authorities can take into account the costs of collating all the information falling within the scope of the request as long as doing so is a necessary first step because they cannot otherwise isolate the environmental information.

Example

A request is received by the Ministry of Justice (MOJ) for all correspondence between itself and Department for Environment, Food and Rural Affairs (DEFRA) between certain dates.

Because of DEFRA's environmental responsibilities the MOJ thinks it is likely that some, but not all of the information held, will be environmental information. As the request is wide ranging the MOJ considers that it may need to refuse the request under section 12 of FOIA (the cost of compliance exceeds the appropriate limit) and regulation 12(4)(b) of the EIR (manifestly unreasonable)

The MOJ estimates that the costs of compliance will exceed the appropriate limit under section 12 FOIA. It then goes on to consider its obligations under the EIR. It considers that it is unable to devise a search strategy in which it only searches for environmental information as it has no way of knowing in advance which correspondence will contain environmental information and which won't. It therefore decides that it will have to collate all the requested correspondence before it can go on to isolate the environmental information.

In this circumstance we would accept that collating all the requested information is a necessary first step because they cannot otherwise isolate the environmental information. We would therefore accept that the costs of collating all the information can be taken into account when deciding if this request is manifestly unreasonable

Under the EIR, it may be valid for a public authority to take into account the cost of separating out the environmental information from the non-environmental information, when considering if the request is manifestly unreasonable. This is different from the position under FOIA because regulation 12(4)(b) is not limited by the FOIA fees regulations. Also, the identification of environmental information would not be classed as applying an exception under the EIR.

This may be relevant in cases where the public authority has included the costs of collating all the information but where the total costs are not sufficient to render the request manifestly unreasonable.

In this situation, a public authority may include the additional costs of separating out the environmental from the non-environmental information and take these costs into account when refusing a request under the manifestly unreasonable exception at regulation 12(4)(b).

UK GDPR and Data Protection Act

A public authority should separate out any information which is the personal data of the requester and deal with this in accordance with its usual data protection procedures.

Multiple requests, some of which are for mixed information

In these cases public authorities should apply the same logic as is given above. The following example demonstrates how this might work in practice.

Example
A public authority receives the following requests in the same letter which all ask for similar information:

Request 1 – "mixed" information ie some non-environmental (FOI) and some environmental information (EIR)

Request 2 – all "EIR" information

Request 3 – "mixed" information ie some non-environmental (FOI) and some environmental information (EIR)

Request 4 – all "FOI" information

Request 5 – a subject access request

Outcome
The public authority can aggregate requests 1, 3 and 4 under FOI (as they meet the requirements for aggregation ie the requests are for the same or similar information).

The Commissioner would allow the aggregation of the costs of providing the environmental information in response to requests 1 and 3 with request 2 under EIR.

The public authority would need to deal with request 5 separately under the UK GDPR/DPA.

More information

This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information or data protection, please Contact us: see our website www.ico.gov.uk.